UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE STATE STREET BANK AND TRUST CO. FIXED INCOME FUNDS INVESTMENT LITIGATION	:	MDL No. 1945
NING YU, On Behalf of Himself and All Others Similarly Situated, Plaintiff,	:	No. 08 Civ. 8235 (RJH)
v.	:	**ECF CASE**
STATE STREET CORPORATION, STATE STREET GLOBAL ADVISORS, LYNN L. ANDERSON, STEVEN J. MASTROVICH, WILLIAM L. MARSHALL, PATRICK J. RILEY, BRUCE D. TABER, RICHARD D. SHIRK, HENRY W. TODD, MARK E. SWANSON, and PETER G. LEAHY, Defendants.	:	**Electronically Filed**

INDEPENDENT TRUSTEES' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

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Dated: August 27, 2010

Pursuant to the Court's Memorandum And Order dated July 14, 2010 (Docket No. 74) (the "July 14 Order"), Defendants Independent Trustees[1] respectfully submit this memorandum of law in support of their motion to dismiss plaintiff Anatoly Alexander's ("Plaintiff") Second Amended Class Action Complaint, dated July 28, 2010 (the "SAC").

For the reasons stated below, the Court should dismiss:

(i) the Section 12(a)(2) claim asserted against the Independent Trustees, and

(ii) Plaintiff's allegations of misrepresentations and omissions that the Yield Plus Fund's (the "Fund") investment objective was to "seek high current income and liquidity by investing primarily in a diversified portfolio of high-quality debt securities and by maintaining a portfolio duration of one year or less."

These allegations fail to state a claim as a matter of law.

I. PLAINTIFF'S SECTION 12(a)(2) CLAIM SHOULD BE DISMISSED BECAUSE THE INDEPENDENT TRUSTEES ARE NOT STATUTORY "SELLERS"

In support of their motion to dismiss Plaintiff's first Amended Complaint,[2] the Independent Trustees argued that the Section 12(a)(2) claim (Count II) should be dismissed because they are not statutory "sellers" pursuant to that statute. The Independent Trustees are not statutory sellers as narrowly defined by the U.S. Supreme Court because they did not either (i) transfer title of the Fund's securities or (ii) solicit security purchases for financial gain. (Docket No. 37 at 4-9.) With respect to the second prong of the statutory seller analysis, Plaintiff failed to allege that the Independent Trustees both (a) engaged in conduct for financial gain and (b) actively solicited

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[1] The defendants Independent Trustees of the SSgA Funds are Lynn L. Anderson, William L. Marshall, Steven J. Mastrovich, Patrick J. Riley, Richard D. Shirk, Bruce D. Taber and Henry W. Todd.

[2] See Independent Trustees' Memorandum Of Law In Support Of Their Motion To Dismiss The Amended Complaints (Docket No. 37).

Plaintiff's purchase of Fund shares. (Id. at 5-9.) All of those arguments and authorities are equally applicable to the allegations in the SAC, and are incorporated by reference herein without repeating them here, in accordance with this Court's July 14 Order.

In addition to those authorities, the Honorable Richard Sullivan recently dismissed a Section 12(a)(2) claim brought against officers and directors of an investment trust because plaintiff failed to adequately allege active solicitation. See Citiline Holdings, Inc. v. iStar Fin. Inc., No. 08-3612-RJS, 2010 WL 1172647, at **3-4 (S.D.N.Y. Mar. 26, 2010). In that case, plaintiff brought a putative class action alleging, among other things, violation of Section 12(a)(2) in connection with a public offering of securities. Id at **1-2. The individually named officers and directors moved to dismiss the Section 12(a)(2) claim on the grounds that they were not sellers under the statute. Id. at *3. In opposing the motion, plaintiff argued that the individual defendants' signing of the registration statements was sufficient to render them statutory sellers. Id. The court rejected that argument and dismissed the Section 12(a)(2) claim. Id. The court observed that "[e]very Court of Appeals to have considered the issue, however, has held that an individual's signing a registration statement does not itself suffice as solicitation under Section 12(a)(2)." Id. In agreeing with the Courts of Appeals' analyses, the court emphasized that "[w]hile Section 11 expressly imposes liability upon every signer of the registration statement, Section 12 does not do so[,]" and plaintiff's argument "would render the distinction a nullity." Id. at *4. Accordingly, the court dismissed the Section 12(a)(2) claim against the individual defendants.

Similarly here, Plaintiff's allegations of the Independent Trustees' purported solicitation amount to no more than that each of them signed the Fund's registration statements. (SAC ¶¶ 11, 13-15, 17, 19-20.) Those allegations are insufficient as a matter of law to state a Section 12(a)(2) claim.

II. THE SAC'S ALLEGATIONS THAT THE FUND'S INVESTMENT OBJECTIVE WAS FALSE AND MISLEADING DO NOT STATE A CLAIM AND SHOULD BE DISMISSED

In the July 14 Order, the Court held that Defendants may file additional motions to dismiss challenging certain of Plaintiff's allegations of misrepresentations or omissions not yet addressed by the Court. (July 14 Order at 8.) Although the Court held that Plaintiff's allegations concerning the percentage tables in the Fund's annual reports were sufficient to state a claim, it is appropriate under applicable case law for the Court to now consider -- and dismiss -- other allegations of misrepresentations or omissions that fail to state a claim as a matter of law.

For example, in Schultz v. TomoTherapy Inc., 676 F. Supp. 2d 780, 784 (W.D. Wis. 2009), plaintiffs asserted a Section 11 claim based upon alleged registration statement misrepresentations concerning the defendant corporation's backlog of orders for its radiation therapy system. The court granted in part and denied in part defendants' initial motion to dismiss, dismissing certain misrepresentation allegations for failure to state a Section 11 claim, but permitting certain other Section 11 allegations to move forward. Id. at 783-84. The court also allowed plaintiffs to file a further amended pleading to address, among other things, the Section 11 pleading defects identified by the court in its dismissal order. Id. Following an amended complaint and further motion practice, the court again dismissed the amended misrepresentation allegations, holding that those allegations were inadequate to state a Section 11 claim. Id. at 793-94.

This Court may similarly dismiss Plaintiff's misrepresentations and omissions allegations not addressed in the July 14 Order.

* * *

The Fund's offering documents stated that the Fund's nonfundamental investment objective was to "seek high current income and liquidity by investing primarily in a diversified portfolio of high-quality debt securities and by maintaining a portfolio duration of one year or less."[3] Plaintiff alleges that the stated nonfundamental investment objective was false and misleading, and therefore violated Sections 11 and 12(a)(2) of the Securities Act, because (i) the Fund invested in illiquid assets and did not disclose liquidity risk (SAC ¶¶ 126-33); (ii) the Fund's portfolio was not "diversified" (id. ¶¶ 119-25); and (iii) the Fund did not invest in "high-quality" debt securities (id. ¶¶ 134-40). Plaintiff's allegations, however, ignore the extensive disclosures contained in the Fund's offering materials and, consequently, do not state a claim of material misrepresentation or omission.[4]

First, Plaintiff's allegations concerning the purported failure to disclose "liquidity" risk do not state a claim. (SAC ¶¶ 126-33.) As disclosed in the Fund's annual report:

> The Fund experienced underperformance due to its holdings in primarily high credit quality instruments related to mortgage and home-equity payments . . . the AAA and AA rated sectors of this market experienced significant price depreciation. . . . The combination of these events resulted in severe illiquidity in this sector which negatively impacted the Fund's performance . . . .

(Annual Report for the period ending August 31, 2007, at 6 ("Annual Report," attached as Exhibit D to the Declaration of Robert A. Skinner (Docket No. 33) (emphasis added).) The Fund's Prospectus fully disclosed the risk that, if an entire market sector suffers a downturn, the Fund may be forced to sell assets at a loss due to market illiquidity. Indeed, the Prospectus stated that the Fund was subject to, among other risks, "sector" risk. (Prospectus at 4-5.) The Prospectus defined sector risk as:

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[3] Prospectus dated December 18, 2006 at 4 ("Prospectus," attached as Exhibit A to the Declaration of Robert A. Skinner (Docket No. 33)).

[4] See, e.g., Steinberg v. PRT Group, Inc., 88 F. Supp. 2d 294, 301-02 (S.D.N.Y. 2000) (dismissing Sections 11 and 12(a)(2) claims and holding that "[i]f a plaintiff's claims of misstatement or omission conflict with the plain language of the prospectus, the prospectus controls and the court need not accept as true the allegations of the complaint").

> [t]he risk that a Fund concentrates its investments in specific industry sectors that have historically experienced substantial price volatility. A Fund is subject to greater risk of loss as a result of adverse economic, business or other developments than if its investments were diversified across different industry sectors. Securities of issuers held by a Fund may lack sufficient market liquidity to enable a Fund to sell the securities at an advantageous time or without a substantial drop in price.

(Id. at 19 (emphasis added).) That fully disclosed sector risk was realized, resulting in a significant drop in value of the Fund's asset-backed and mortgage-related securities. (See Annual Report at 6.)

Second, Plaintiff's allegations that the Fund did not invest in a "diversified" portfolio also do not state a claim of material misrepresentation. (SAC ¶¶ 119-25.) Plaintiff alleges that the Fund's portfolio was not "diversified" because it was "heavily-weighted with investments in risky mortgage-related and/or mortgage-backed securities . . . ." (Id. ¶ 120.) According to Plaintiff, the Fund should have "spread[] the risks" by investing in additional securities "secured by auto loans, credit card receivables, leases, installment contracts, personal property, mortgages, corporate notes, etc." (Id. ¶ 125.) Those allegations, however, ignore the definition of "diversified." As disclosed in the Fund's Statement Of Additional Information, a fund is "diversified" under the Investment Company Act of 1940 if "at least 75% of the value of its total assets is represented by cash and cash items (including receivables), Government securities, securities of other investment companies, and other securities of any single issuer limited to 5% or less of [a fund's] total assets, and to not more than 10% of the outstanding voting securities of such issuer."[5] Plaintiff does not -- and could not -- allege that the Fund's portfolio was not "diversified" under that disclosed definition.

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[5] Statement of Additional Information dated December 18, 2006, at 3 ("SAI," attached as Exhibit B to the Declaration of Robert A. Skinner (Docket No. 33)). The Investment Company Act provides that a "'Diversified company' means a management company which meets the following requirements: At least 75 per centum of the value of its total assets is represented by cash and cash items (including receivables), Government securities, securities of other investment companies, and other securities for the purposes of this calculation limited in respect of any one issuer to an amount not greater in value than 5 per centum of the value of the total assets of such management company and to not more than 10 per centum of the outstanding voting securities of such issuer." 15 U.S.C. § 80a-5(b)(1) (2010).

Third, equally without merit are Plaintiff's allegations that the Fund did not invest in "high-quality" debt securities. (SAC ¶¶ 134-40.) Plaintiff alleges that the Fund did not invest in high-quality securities because the Fund's portfolio became increasingly concentrated in mortgage-related securities over the putative class period. (Id. ¶ 135.) Plaintiff further alleges that it was "widely recognized" that such securities were "risky." (Id.) As the Court observed in its Memorandum And Opinion dated February 22, 2010 (Docket No. 57) ("February 22 Opinion"), however, the Fund's prospectuses "employed the term 'high-quality' specifically to describe the relative credit grade of the Fund's holdings." (Docket No. 57 at 11.) In that regard, the Prospectus stated that "[t]he Fund attempts to meet its objective by investing primarily in high-quality, dollar-denominated, investment grade debt instruments, such as mortgage related securities, corporate notes, variable and floating rate notes and asset-backed securities." (Prospectus at 4 (emphasis added).) The Fund's Prospectus defined "investment grade" as securities "rated in one of the four highest categories" by a national ratings agency. (Id. at 47; see also SAI at 40-42.)

As publicly disclosed in the Fund's Annual Report, Fund underperformance was due to "[i]nstitutional investors . . . unwind[ing] leverage in their portfolios and liquidating positions across a broad spectrum of fixed income sectors." (Annual Report at 6.) As a result, high credit quality secured debt related to mortgage and home equity payments in the investment grade sectors in which the Fund invested experienced significant price depreciation "despite underlying credit fundamentals which continued to indicate severe underpricing of these securities." (Id.) There is no allegation -- nor could there be -- that the Fund's securities at issue were not rated investment grade at the time. See February 22 Opinion at 13 (holding that the "accuracy of offering documents must be assessed in light of information available at the time they were published"). Simply put, as fully disclosed to shareholders, the Fund invested in investment grade debt securities as determined by national ratings agencies. Plaintiff's hindsight allegations that Fund managers should not have relied on those third-party investment ratings do not state a misrepresentations or omissions claim as a matter of law. (See SAC ¶¶ 137-38.) This legal point is fundamental to a proper framing of this case going forward.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss:

(i) the Section 12(a)(2) claim asserted against the Independent Trustees, and

(ii) Plaintiff's allegations of misrepresentations and omissions that the Fund's investment objective was to "seek high current income and liquidity by investing primarily in a diversified portfolio of high-quality debt securities and by maintaining a portfolio duration of one year or less."

These allegations fail to state a claim as a matter of law.

Dated: August 27, 2010
New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as indicated on the Notice of Electronic Filing. I further certify that on August 27, 2010, I caused a true copy of the foregoing document to be served by first class mail, postage prepaid upon the following counsel:

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Dated: August 27, 2010

/s/ Thomas J. Dougherty
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